IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 107 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 113 of 2020)

1. MICHAEL MOLENDA @ NYAHEGERE
2. KITARI MWITA @ MUHABE ..... **APPELLANTS**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

05.09.2022 & 07.09.2022

Mtulya, J.:

The respondent in the present appeal is persuading this court to uphold the decision of the **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 133 of 2020** (the case) with regard to the third count drafted in the Charge Sheet which led to the conviction of the appellants with the offence of unlawful possession of government trophies contrary to section 86 (1) & 2 (b) **Wildlife Conservation Act** [Cap. 283 R.E. 2002] as amended (the Wildlife Act), read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2019] (the Economic Crimes Act).

The respondent prays this court to set a new precedent in criminal law of economic crimes cases in a situation where the exact location of the scene of the crime cannot be established with certainty. The question which this court is asked to respond is: *whether section 86 (1) & 2 (b)* ***Wildlife Act*** *can be exceptional to general principles guiding criminal liability*. I will explain for easy appreciation of the dispute and prayer of the respondent.

Mr. Michael Molenda @ Nyehegere and Mr. Kitari Mwita @ Muhabe (the appellants) were arrested and associated with three offences *viz*: first, unlawfully entry in the national park contrary to section 21 (1) (a) & 2 of the **National Parks Act** [Cap. 282 R.E. 2002] (the National Parks Act); second, unlawful possession of weapons in the national park against section 24 (1) (b) of the National Parks Act; and third, unlawful possession of government trophies against section 86 (1) & 2 (b) of the **Wildlife Act** read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic Crimes Act**.

Following the allegations, the appellants were arraigned before the district court to reply the named three (3) charges levelled against them. After full hearing of the case, the appellants were convicted on the first & third counts and sentenced to serve one (1) year imprisonment for the first offence and twenty (20) years imprisonment for the third crime

and all sentences were ordered to run concurrently. Immediately after the pronouncement of the sentencing order on 16th June 2021 by the district court in the case, the appellants were recorded to dispute the judgment and accordingly preferred the present appeal in **Criminal Appeal Case No. 107 of 2022** (the appeal).

In this appeal, the appellants had registered three (3) reasons of appeal complaining on: first, inappropriate evidence of trophies; second, incorrect evidence of names; and finally, non-participation of the appellants during destruction of the government trophies. The day before yesterday, on the 7th September 2022, when the parties in this appeal were summoned to register relevant materials in favour and against the appeal, through teleconference placed in this court, the respondent marshalled Ms. Agma Haule, learned State Attorney, whereas the appellants appeared themselves without any legal representation.

However, when the appeal hearing took its course, the appellants prayed Ms. Haule to start the ball rolling by replying their three (3) detailed grounds of appeal. The prayer was well received by Ms. Haule. As officer of this court assisting this court to arrive at just decisions, Ms. Haule declined to reply directly to the three (3) raised complaints of the appellants, but decided to

concede the incorrectness of the first and second count in the charge sheet, on unlawful entry into the national park and unlawful possession of weapons in the national park.

In bolstering his concerns, Ms. Haule submitted that the first offence is non-existing crime and the second offence cannot be established in absence of specific national park boundaries as per requirement of the law in the precedent of **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017. I have consulted page 18 & 19 of the judgment in the cited precedent, and found the following directives of our superior court, the Court of Appeal:

> *...considering the uncertainty of the testimonies of PW1 and PW2 concerning the exact place where the appellant and another were arrested within the boundaries of the Serengeti National Park as stipulated by the law,* ***we have no hesitation to state that the appellant defence raised reasonable doubt on whether he was arrested within the boundaries of SENAPA****. To this end,* ***the doubt had to be resolved in his favour by both the trial and first appellate courts****. In the case of* ***Chenyonga Samson Nyambare v. The Republic, Criminal Appeal No 510 of 2019****, in*

which the prosecution did not explain beyond reasonable doubt if truly the area in which the appellant was found grazing cattle was within Serengeti National Park, the Court stated that: since Ikorongo game reserve boundaries are statutorily defined, the evidence on record must place the appellant inside statutory limits of the reserve. ***It will not suffice to shift the burden to the accused person, where PW1 and PW2 merely narrate the game scout arrested the appellant inside Ikorongo Game Reserve without demonstrating the area of the arrest of the appellant to be within the statutory boundaries of that reserve***.

(Emphasis supplied).

Similarly, in the instant appeal, a park ranger of Tanzania National Park (TANAPA) at Serengeti National Park (SENAPA), Mr. Amani Gidion @ Mbwambo (PW1) narrated, at page 10 of the proceedings of the district court in the case, briefly, that:

On 5th November 2020 at about 11:00 hours at ***Nyakitapembe area in Serengeti National Park within Serengeti District in Mara Region****, I and fellow rangers, Venance Muhomi, Johnson Monja, Paulo Zuo*

and Steven Sabai, we saw two persons into the bush, surrounded there and managed to arrest them.

(Emphasis supplied).

On the other hand Mr. Venance Muhoni, who assisted PW1 in the alleged arrest of the appellants, was summoned and arraigned as a second prosecution witness (PW2). His testimony shows, at page 22 of the district court proceedings in the case, that:

On 5th November 2020 at about 11:00 hours at ***Nyakitapembe area in Serengeti National Park within Serengeti District in Mara Region****, I and fellow rangers, Paulo Zuo, Amani Mbwambo, Steven Sabai, were at patrol and saw two persons into the bush. [We] surrounded there and managed to arrest both.*

(Emphasis supplied).

The defence of all appellants on the other produced materials at page 33 and 35 of the proceedings of the district court in the case to show that they were arrested at Mto Sweta cultivating maize and were arrested by Kenyan Park Rangers and brought to Kenyanganga and Lemayi Camp Sites before being taken to Mugumu Police Station. Reading the Charge Sheet levelled against the appellants, it shows that they are alleged to have committed the three (3) offences at Nyakitapembe area in

SENAPA within Serengeti District in Mara Region, whereas Inventory Form admitted as exhibit PE. 4 duly signed by the Resident Magistrate and the appellants show that they were arrested at Mto Sweta area in TANAPA within Tarime District in Mara Region.

From the record of appeal, it is obvious that PW1 and PW2 produced general statement on where they have arrested the appellants without showing the statutory limits described in the First Schedule to the National Parks Act. The prosecution had to prove the allegations in the particulars of the counts by demonstrating the particular place which fell within the statutory boundaries of SENAPA. Regrettably, this was not accomplished by the prosecution at the district court during the hearing of the case.

I am also quietly aware that Ms. Haule submitted that the first offence is non existing offence. I think, in my considered opinion, that is the correct interpretation of the law in section 21 (1) (a) & 2 of the National Parks Act. There is already in place a bunch of precedents of this court and Court of Appeal on the subject and this court will maintain the certainty of the matter (see: **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019; **Mahende Gitocho @ Mahenda v. Republic**, Criminal Appeal Case No. 159 of 2021; **Mathias Maisero @ Marwa &**

Another v. Republic, Criminal Appeal No. 104 of 2021; **Jona Mosi @ Masoya v. Republic**, Criminal Appeal Case No. 144 of 2021; **Mayongera Mayunga @ Mayongera v. Republic**, Criminal Appeal Case No. 134 of 2021; **Masagali Mebacha @ Mazanzu v. Republic**, Criminal Appeal No. 158 of 2020; and **Peter Matoroke @ Rante v. Republic**, Criminal Appeal No. 149 of 2020).

In the precedent of **Willy Kitinyi @ Marwa v. Republic** (supra), the Court of Appeal noted the issue of *actus reus* on the offence as deleted by amendment brought on record by the **Written Laws (Miscellaneous Amendment) Act No. 11 of 2003** (the Act). The Court observed:

> *We instantly agree with Mr. Temba that in relation to the first count, the appellant was charged with and convicted on a non-existing offence, because section 21 (1) (a) (2) of the NPA does not create the offence of unlawful entry into a game reserve. We need not mince words, in our view, because this is not one of those defects that can be cured by section 388 of the CPA. Very recently in* ***Dogo Marwa @ Sigana v. Republic,*** *Criminal Appeal No. 512 of 2019, we faced a similar situation and held that:* ***it is now apparent that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a***

national park) *and got confusion in section 21 (1) of the NPA.*

(Emphasis supplied).

Following this statement of our superior court, it is obvious that the offence of unlawful entry into national parks contrary to section 21 (1) (a) & (2) of the Act cannot be prosecuted in our courts, unless the laws is amended to enact the *actus reus* of the offence. I therefore agree with Ms. Haule that the offence does not exist hence a person cannot be prosecuted and held responsible in the provision.

However, Ms. Haule has brought in place a very interesting point with an idea of protecting our natural resources trophies. In her opinion, despite the collapse of the first two (2) offences, the third offence was established by the prosecution beyond reasonable doubt. In order to persuade this court in setting a new precedent, Ms. Haule argued that the evidences produced by PW1 and PW2 pointing fingers to the appellant on possession of government trophies were not protested during cross examination as displayed at page 10 and 24 of the district court proceedings in the case and exhibits Certificate of Seizure, Trophy Valuation Certificate and Inventory Form, admitted as PE.1, PE.3 and PE.4 respectively, show that the offence was committed by the appellants.

In order to bolster her argument, Ms. Haule submitted that the sequence of events leading to arrest, valuation and participation of the appellants in PE.4 have complied with the directives of the Court of Appeal in the precedent of **Mohamed Juma Mpakama v. Republic,** Criminal Appeal No. 385 of 2017. According to Ms. Haule the cited exhibits have remained on record undisturbed hence the appellants must be responsible for their actions. With the position of the Court of Appeal when it finds uncertainty on location where the offence was committed, Ms. Haule submitted that the decisions **Maduhu Nhandi @ Limbu v. Republic** (supra) and **Dogo Marwa @ Sigana v. Republic** (supra) mentioned lack of boundaries, but declined to go further into details on stating the situation like the present one.

When Ms. Haule was questioned by this court on whether it is possible to convict accused persons without specifying the area where the offence was committed, she replied that it is a matter of knowing the name of the area in which the appellants were arrested and legality of being found in possession of the trophies.

According to her, the prosecution knows the area as Nyakitapembe whereas the defence knows the areas as Mto Sweta, and in any case section 86 (1) & (2) (a) of the of the Wildlife Act has no requirement of specific location, but unlawful

possession of government trophies. However, Ms. Haule forgets two (2) things, *viz*: first, PW1 and PW2 mentioned Nyakitapembe area in SENAPA within Serengeti District in Mara Region whereas the defence and PE.4 display Mto Sweta area in TANAPA within Tarime District of Mara Region; and second, the Court of Appeal indicated that lack of specification of the area where the appellants were arrested brings doubts and the doubts have to be resolved in favour of the appellants (see: **Maduhu Nhandi @ Limbu v. Republic** (supra). There are doubts in the present appeal and have to be resolved in favour of the appellants. There is a large family of precedents in favour of the position (see: **Mohamed Said Matula v. Republic** [1995] TLR 3; **Maduhu Nhandi @ Limbu v. Republic** (supra); and **Makuru Joseph @ Mobe & Another v. Republic**, Criminal Appeal Case No. 146 of 2021).

While I may agree with Ms. Haule that the law as enacted in section 86(1) (2) (a) of the Wildlife Act may not need specific location, but I may disagree with her in the present case where the location was mentioned on record only that the prosecution failed to prove its case at the district court at the required standard. It cannot shift the burden to the appellants or trying to fill the gaps of the case at the appellate level. It would be unwise to produce other facts or interpreting witnesses' evidences in the

appeal stage for purposes of netting accused persons of all styles and sorts. This court cannot be part of that thinking. The prosecution has to perform its duties as directed by the Court of Appeal in the cited precedents. The situation will cherish a long established principles of criminal responsibility with regard to *mens rea* and *actus reus*. I do not think if section 86(1) (2) (a) of the Wildlife Act was enacted as exception to the principles.

Having said so, and considering the three (3) grounds of appeal registered by the appellants were captured during analysis of the third offence, and noting the record is obvious that the three (3) offences were not established beyond reasonable doubt as per standard required in section 3 (2) (a) of the **Evidence Act** [Cap. 6 R.E. 2019], it is obvious that the prosecution faulted its own case (see: **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).

I think, in my considered opinion, the present appeal was brought in this court with good reasons to dispute the judgment of the district court in the case. I am therefore moved to allow the appeal and further quash the conviction and set aside the sentences meted to the appellants. I order an immediate release

of the appellants from prison custody, unless they are held for some other lawful cause.

It is so ordered.

Right of appeal explained to the parties.

F. H. Mtulya

Judge

07.09.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Nimrod Byamungu and in the presence of the appellants, Mr. Michael Molenda @ Nyahegere and Kitari Mwita @ Muhabe, through teleconference placed at this court in Bweri area within Musoma, Serengeti Prison and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F. H. Mtulya

Judge

07.09.2022